Filed 10/4/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE Plaintiff and Respondent, v. CHRISTOPHER BIERRA RIBERA, Defendant and Appellant.	F045300 (Super. Ct. No. 03CM4557) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. James LaPorte, Commissioner.

George L. Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Michael D. Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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Christopher Bierra Ribera appeals from the judgment entered following a jury trial that resulted in his conviction for one count of aggravated sexual assault upon a child and

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, and IV.

two counts of aggravated lewd conduct with a child. On appeal, defendant contends that (1) the trial court erred in granting the People's motion to amend the information to change the dates that the offenses allegedly occurred; (2) there was insufficient evidence to support the jury's findings that defendant sodomized and assaulted the victim through use of duress or fear; (3) there was insufficient evidence to support defendant's conviction for aggravated sodomy because the penetration of the victim occurred through her underwear; and (4) the imposition of upper and consecutive terms violates *Blakely v. Washington* (2004) 124 S.Ct. 2531.

In the published portion of this opinion, we address whether anal penetration through clothing is sodomy in violation of Penal Code section 286. We conclude that where there is penetration into a victim's anus by a perpetrator's sexual organ, it is sodomy in violation of Penal Code section 286, even if the victim is wearing clothes at the time.

In the unpublished portion, we hold that the trial court did not abuse its discretion in granting the People's motion to amend the information and conclude that there was sufficient evidence to support the defendant's convictions for sodomy and lewd and lascivious conduct with a child under the age of 14. We further hold that defendant's sentence does not violate *Blakely*.

PROCEDURAL HISTORY

On January 6, 2004, the Kings County District Attorney's Office filed an information alleging the following criminal counts: count one, aggravated sodomy on a child under the age of 14 and more than 10 years younger than defendant (Pen. Code, § 269, subd. (a)(3)); count two, aggravated lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1)); and count three, lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a)). The information alleged that the three charged offenses took place "[b]etween the 15th day of June, 2002, and the 6th day of July, 2002 …." Defendant pled not guilty to these counts on January 7, 2004.

On March 2, 2004, a jury trial began. On that same day, the trial court permitted the filing of an amended information which made two changes to the original information. First, it changed count three to allege the offense of aggravated lewd conduct against a child under the age of 14. Second, it added language specifying the conduct alleged to have occurred in counts two and three.

On March 4, 2004, the trial court granted the People's motion to amend the information again to permit a change reflecting the dates that the offenses allegedly occurred as being between August 2002 and October 2002. Defendant made a motion for mistrial, which was denied. The court granted defendant's motion for a continuance and ordered the trial continued until March 8, 2004. That same day, defendant pled not guilty to the amended information.

Subsequently, a jury found defendant guilty on all three counts. Defendant was sentenced to prison for a term of 29 years to life, calculated as follows: 15 years to life on count one, a consecutive middle term of six years on count two, and a consecutive upper term of eight years on count three.

FACTUAL HISTORY

This case involves a child, N.J., born on July 6, 1992, whose mother was involved in an intimate relationship with defendant. During the course of this relationship, N.J. claims that defendant committed three sex offenses against her one night when defendant was babysitting her while her mother was working. According to N.J., defendant entered the room where she was sleeping. She awoke to find that defendant was not wearing any underwear and had placed his penis in her hand. N.J. pretended she was still asleep while defendant was in the room because she was afraid he would kill her if she said anything about what was happening. N.J. moved her hand away from defendant's penis, acting as though it had dropped away in her sleep. Defendant, however, moved N.J.'s hand back onto his penis. N.J. attempted to move her hand away several more times, but each time, defendant placed it back on his penis.

Defendant then pulled N.J. on top of him, and began moving her up and down against his penis, which rubbed N.J. through her underwear, near her private area. Defendant next rolled N.J. onto her side and "poked" his penis "really hard" into her "behind." Although she was wearing underwear, N.J. could feel defendant's penis and it hurt her. In fact, when N.J. went to the bathroom the next morning, she felt pain. N.J. continued to pretend she was sleeping while defendant rubbed against her. N.J. did not tell her mother about what happened because she was afraid her mother would not believe her.

N.J. testified that she saw defendant hit her brother with a belt "[a] lot." N.J. also testified that defendant hit her "a lot" with a belt on her "behind." Defendant's hitting her made N.J. feel afraid. N.J. stated that she also saw defendant hit her mother's head on the table and that defendant screamed at her mother. After seeing defendant abuse her mother, N.J. testified that she was afraid defendant was "going to hurt [her] the same way."

In January 2003, N.J. reported the assault after hearing a presentation by a woman who spoke at N.J.'s school regarding good and bad touching. At trial, defendant denied sexually assaulting N.J.

DISCUSSION

I. Motion to amend

Defendant argues that the trial court impermissibly allowed the prosecution to amend the information to change the dates the offenses allegedly occurred to conform to the evidence presented at trial.

A. Pertinent facts

Officer Burt Peterson of the Lemoore Police Department testified at the preliminary hearing. Peterson interviewed N.J. and she told him that the sexual assault occurred while she was living in the house in the northwest area of Lemoore, "during the summer of 2002 after school." After speaking with N.J.'s mother, Peterson testified that

he was able to narrow the time frame during which the assault occurred to between June 15, 2002 and July 6, 2002. The information filed after the preliminary hearing reflected this time period.

At trial, N.J. testified that she was in school when the assault occurred and that it was hot outside. N.J. stated that she attended Martin Luther King, Jr., School, which instructs children on a year-round basis, when the assault occurred. On cross examination, N.J. explained that she had received various gifts for her birthday in July that year and that she had those gifts when the assault occurred. N.J.'s mother, Victoria L., testified that her daughter attended Martin Luther King, Jr., School from August to November 2002.

Following this testimony, the People moved to amend the information in order to conform it to the testimony provided by N.J. and her mother. The prosecution wanted to change the time frame that the offense allegedly occurred from between June 15, 2002 and July 6, 2002 to between August 2002 and October 2002. Defense counsel objected, arguing that defendant had an "air tight" alibi for the first time frame (he was in jail), and he was unprepared to defend against the new time frame.

After reviewing the preliminary hearing transcript, the court granted the People's motion and granted defendant's motion for a continuance of the trial until Monday, March 8, 2004, in order to allow defendant to investigate his whereabouts during this new time period. On March 8, defense counsel informed the court that defendant had a sufficient opportunity to conduct an investigation and that no further continuance was necessary.

B. Standard of review and applicable law

"The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings …." (Pen. Code, § 1009.) However, an information may not be amended "so as to charge an offense not shown by

the evidence taken at the preliminary examination." (Pen. Code, § 1009.) An amendment is generally proper "unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement may be granted. [Citation.] Whether the prosecution will be permitted to amend an information is a matter within the sound discretion of the trial court and its determination will not be overturned on review in the absence of a clear abuse thereof. [Citation.]" (*People v. Byrd* (1960) 187 Cal.App.2d 840, 842.)

C. Analysis

The People's motion to amend the information properly was granted as it was supported by the evidence derived from the preliminary hearing. Peterson testified that N.J. told him the assault occurred after school ended in the summer of 2002 and while she lived in a house in Lemoore. When N.J. stated that the assault occurred after school ended, she may have meant it happened after school ended *for the day*, not necessarily for the year. This ambiguity is not surprising given N.J.'s age at the time of the assault—she was nine years old. In addition, N.J.'s statement to the officer that the assault occurred in Lemoore in the summer of 2002 is also consistent with her trial testimony that it was hot outside, and with defendant's testimony that he lived in Lemoore between September 2002 and January 2003.

Further, the amendment did not add any new counts or charge any violations of new or different code sections. The only difference between the informations is the time frame during which the sexual assault allegedly occurred. As a result, the amendment did not change the essential components of the offense charged; the perpetrator remained the same, the victim remained the same, and the conduct remained the same.

The People requested the amendment in order to conform the pleading to N.J. and her mother's testimony at trial. Courts have held that "[e]ven in alibi cases, neither the time [citation] nor the place at which an offense is committed [citations] is material, and an immaterial variance will be disregarded [citation]." (*People v. Pitts* (1990) 223

Cal.App.3d 606, 906.) It is not uncommon for children to be unable to recall the specific date that a particular event occurred. (*People v. Grant* (1999) 20 Cal.4th 150, 155-156; *People v. Jones* (1990) 51 Cal.3d 294, 319.) The crucial part of N.J.'s testimony—her description of the sexual assault—remained consistent throughout the investigation and during trial.

In addition, contrary to defendant's contention on appeal, his ability to defend the case was not prejudiced. Following the amendment, the court granted defendant's motion for a continuance. Defense counsel later confirmed that he had sufficient time to conduct an investigation and did not need any more time. Given his counsel's admission, defendant has made no showing that he suffered any prejudice as a result of the amendment. In addition, we reject defendant's assertion that he was prejudiced by the fact that he might have entered into plea negotiations as it is speculative, especially in light of his denial that any assault occurred.

We conclude that the trial court did not abuse its discretion by permitting the amendment and, in any event, defendant has failed to establish that he suffered any prejudice.[1]

II. Offenses committed by means of duress or fear

Defendant contends that his convictions must be reversed because the record does not contain substantial evidence supporting the jury's findings that he committed the offenses against N.J. by means of duress, menace, or fear. He argues that there was no evidence he took advantage of N.J.'s fear of him when he committed the assault or that he abused or threatened her prior to the assault. The People argue there was sufficient

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[1]Having determined that defendant did not suffer any prejudice as a result of the amendment, we do not address his argument that his due process rights under the federal and state Constitutions were violated. (*People v. Garringer* (1975) 48 Cal.App.3d 827, 833.)

evidence based on N.J.'s testimony that she was afraid defendant would kill her if she protested the assault.

A. Standard of review

When the sufficiency of the evidence is challenged, the question on appeal is whether the conviction is supported by substantial evidence, i.e., evidence from which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) "In making this determination, we '"must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) We must not substitute our judgment for that of the jury by second-guessing its credibility determinations or reweighing the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) In the end, "it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt.… If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

B. Analysis

In our view, there was substantial evidence to support the jury's finding that defendant's sexual assault against N.J. was committed through duress and fear of immediate and unlawful bodily injury. Consequently, defendant properly was convicted of aggravated lewd conduct against a child under the age of 14 and aggravated sodomy. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13 (*Cochran*); Pen. Code, §§ 269, subd. (a)(3) & 288, subd. (b)(1).)

1. Duress

Duress is defined as "'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities

to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' [Citations.] 'The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.' [Citation.] Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. [Citations.] [¶] The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and her relationship to the defendant." (*Cochran*, *supra*, 103 Cal.App.4th at pp. 13-14.)

N.J.'s testimony supports the inference that defendant used duress to accomplish his sexual assault against her. At the time of the assault, N.J. was nine years old, "an age at which adults are commonly viewed as authority figures. The disparity in physical size between [a nine]-year old and an adult also contributes to a youngster's sense of [her] relative physical vulnerability." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 51.) In addition, defendant was her mother's boyfriend, and N.J. had been left in his care while her mother was at work.

Defendant was an authority figure to N.J. and had created a coercive environment through his repeated physical abuse of N.J. and her family. N.J. testified at length about the spankings and beatings that she had suffered and those she had witnessed her brother and mother suffer at the hands of defendant.

None of the cases cited by defendant compel a contrary conclusion. For example, *People v. Hecker* (1990) 219 Cal.App.3d 1238 is factually distinguishable. (*Hecker* was disapproved as "overly broad" in *Cochran*, *supra*, 103 Cal.App.4th at p. 15.) In that case, the victim testified she was not afraid the defendant would harm her and admitted that she had not been threatened. (*People v. Hecker, supra*, 219 Cal.App.3d at pp. 1242,

1250.) Here, N.J. stated during direct examination that she feigned sleep because she was "scared that [defendant] would kill [her]."

Defendant's reliance on *People v. Espinoza* (2002) 95 Cal.App.4th 1287 similarly is misplaced. In *Espinoza*, the defendant molested his 12-year-old daughter, L., on five occasions. During the fifth molestation, the defendant attempted to put his penis inside of L., who moved her body to prevent penetration. The defendant was convicted of a forcible lewd act pursuant to Penal Code section 288, subdivision (b). (*People v. Espinoza*, *supra*, 95 Cal.App.4th at pp. 1291-1293.) The appellate court reversed defendant's conviction, finding there was insufficient evidence of duress. "No evidence was adduced that defendant's lewd act and attempt at intercourse were accompanied by any 'direct or implied threat' of any kind. While it was clear that L. was afraid of defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her. It would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation." (*Id.* at p. 1321.)

In this case, however, N.J. testified at length about the physical abuse she and her family suffered at defendant's hands. N.J. had seen defendant hit her brother with a belt and slam her mother's head into a table. N.J. was also hit by defendant with a belt on her behind. Under these circumstances, it is not surprising that she was reluctant to confront defendant openly while he was sexually assaulting her.

In sum, the evidence established that defendant committed his sexual assault of N.J. by means of duress.

2. Fear

> "[T]he element of fear of immediate and unlawful bodily injury has two components, one subjective and one objective. The subjective component asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit … against her will. In order to satisfy this component, the extent or seriousness of the injury

> feared is immaterial. [Citations.] [¶] In addition, the prosecution must satisfy the objective component, which asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it. [Citation.]" (*People v. Iniguez* (1994) 7 Cal.4th 847, 856 [defining fear in the context of rape] (*Iniguez*).)

In this case, N.J.'s subjective fear was established. N.J. testified that she was "scared that [defendant] would kill [her]" if she made any effort to get help from someone. The objective component of fear was also satisfied by defendant's stealth in approaching and assaulting N.J. while she slept. Any female—particularly a child—would feel threatened if she awoke to find an adult male standing next to her, without his underwear, manipulating her hand so that it was able to hold his penis.

The facts of this case are very similar to those presented in *Iniguez*, *supra*, 7 Cal.4th 847, in which the defendant, who was naked, approached the sleeping victim from behind and raped her. The victim, frozen by her fear that defendant would react violently if she protested, said and did nothing to express her lack of consent. (*Id.* at pp. 851-852.) The California Supreme Court found that substantial evidence supported the subjective component of fear—that the victim "genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit … against her will" because she testified she was afraid the defendant would do something violent. (*Id.* at p. 856.)

In support of the objective component, the court noted that "[a]ny man or woman awakening to find himself or herself in this situation could reasonably react with fear of immediate and unlawful bodily injury. Sudden, unconsented-to groping, disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling and intolerable invasion of one's personal autonomy that, in and of itself, would reasonably cause one to react with fear. [Citations.]" (*Iniguez, supra,* 7 Cal.4th at p. 858.) The court held that "[t]he jury could reasonably have concluded that under the totality of the circumstances, this scenario, instigated and choreographed by defendant, created a

situation in which [the victim] genuinely and reasonably responded with fear of immediate and unlawful bodily injury, and that such fear allowed him to accomplish sexual intercourse with [the victim] against her will." (*Id.* at p. 859.)

Defendant's reliance on our holdings in *People v. Young* (1987) 190 Cal.App.3d 248 and *People v. Jeff* (1988) 204 Cal.App.3d 309 are misplaced. In *Young*, the defendant was convicted of various sexual offenses against a child under the age of 14, including lewd and lascivious conduct, oral copulation, and forcible rape. The victim testified that she was afraid of the defendant, but admitted that he did not say anything to make her afraid. (*People v. Young, supra,* 190 Cal.App.3d at p. 252.) We reversed the defendant's rape conviction, concluding there was insufficient evidence that the defendant committed the act by means of fear of immediate and unlawful bodily injury. (*Id.* at pp. 258-259.) We reasoned that there was no evidence of bodily harm preceding the act, such as a spanking, and the victim did not testify that she was afraid of injury. (*Id.* at p. 259.)

In *People v. Jeff*, *supra*, 204 Cal.App.3d 309, the defendant was convicted of rape, sodomy, oral copulation, and lewd and lascivious acts upon a child under the age of 14. The victim testified that she acquiesced to having intercourse with the defendant because she was afraid to refuse, fearing that he would hurt her or her parents. (*Id.* at pp. 317-320.) We concluded that the evidence was insufficient to support a finding that the rape was induced by fear, noting that although the victim testified she was afraid of defendant, "there was no history of acts and conduct by defendant toward [the victim] such as slapping, spanking, and other punishments, to dominate and control her." (*Id.* at p. 329.)

Unlike *Young* and *Jeff*, there is a history of physical abuse by defendant against N.J. prior to the sexual assault—she suffered repeated spankings with a belt while her mother was in a relationship with defendant. In addition, N.J. witnessed defendant hit her family members. While the sexual assault in this case was not immediately preceded

by a spanking, there is a history of physical abuse that would cause a nine-year-old child to fear additional physical abuse if she were to resist defendant's assault.

III. Sodomy conviction

Defendant argues that "anal penetration through clothing is not sodomy but rather is a violation of Penal Code [section] 289, a crime that was not charged in this case." He contends that his conviction of sodomy was not supported by the evidence because N.J. testified she was wearing her underwear when defendant "poked" his penis into her behind. The People argue that Penal Code section 268 does not require skin-to-skin contact to sustain a sodomy conviction. We conclude that where a victim's anus is penetrated by a perpetrator's penis, it is sodomy in violation of Penal Code section 286, regardless of whether the victim is wearing clothes such as underwear.

Penal Code section 286 contains no express or implied requirement that there be skin-to-skin contact between the victim and the perpetrator in order to establish the offense of sodomy. The statute provides that "[s]odomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (Pen. Code, § 286, subd. (a).) As we read the statute, its applicability is not limited to situations where a perpetrator inserts his penis into a victim's bare anus.

Our interpretation is consistent with two out-of-state cases which hold that there is no requirement of skin-to-skin contact to establish the crime of sodomy. (*State v. Pearson* (1994) 514 N.W.2d 452 (*Pearson*); *Holland v. State* (1993) 434 S.E.2d 808 (*Holland*).) In *Pearson*, the Iowa Supreme Court held that there was no language in the statute limiting its scope only to skin-to-skin contact. The court held that "prohibited contact may occur even though the specified body parts or substitutes are covered." (*Pearson*, *supra,* 514 N.W.2d at p. 455.) Along the same lines, in *Holland*, the Georgia Court of Appeals held that its state's sodomy law contained no requirement that the contact between the defendant's penis and the victim's anus be "skin-to-skin." It upheld

the defendant's plea where the victim testified that the defendant was wearing his underwear when the contact occurred. (*Holland*, *supra*, 434 S.E.2d at pp. 808-809.)

We also disagree with defendant's argument that his conduct could only lead to a prosecution for sexual penetration by a foreign object pursuant to Penal Code section 289 because "it is the clothing, strictly speaking, that has contact with the victim's anus." Penal Code section 289 defines a foreign object as "any part of the body, *except a sexual organ*." (Pen. Code, § 289, subd. (k)(2), emphasis added.) As a result, insertion of a penis into an anus does not violate section 289. Rather, this type of sexual assault constitutes the crime of sodomy prohibited by section 286, subdivision (a). It is immaterial whether there was any clothing or barrier between the anus and the penis at the time of the penetration. The key component here is that defendant used his penis to penetrate N.J.'s anus—not an "unknown" object as required by section 289.[2]

Finally, common sense dictates that it makes no difference whether a victim is clothed as long as penetration occurs. We believe that "the legislature did not intend 'that a piece of clothing as flimsy as a pair of shorts or even a girl's panties' would insulate a defendant from punishment for performing" sodomy on a child. (*Pearson*, *supra*, 514 N.W.2d at p. 455.)

We conclude that there was substantial evidence that defendant committed sodomy upon N.J. based on her testimony that she saw defendant's penis and felt it poke her covered behind. There is little question that penetration occurred as the child suffered pain the next day.

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[2]Where the type of object that penetrates the anus is unknown, such penetration would constitute the offense of penetration by an unknown object and not sodomy. (Pen. Code, § 289, subd. (k)(3).)

IV. Sentencing issues under Blakely v. Washington

Defendant asserts that his sentence violates the Sixth Amendment as interpreted in *Blakely v. Washington, supra,* 124 S.Ct. 2531. He argues that his sentence to the upper term for the second count of aggravated lewd conduct with a child and consecutive sentences for both counts of aggravated lewd conduct with a child violate *Blakely* because the court made factual findings that are required to have been made by the jury.

After briefing was completed in this case, our Supreme Court issued its opinion in *People v. Black* (2004) 35 Cal.4th 1238. The court held that the imposition of upper terms and consecutive sentences under California law is unaffected by *Blakely* and the related decision in *United States v. Booker* (2005) 125 S.Ct. 738. (*People v. Black, supra,* 35 Cal.4th at pp. 1260-1261.) Accordingly, we reject defendant's arguments.

DISPOSITION

The judgment is affirmed.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P. J.

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Levy, J.